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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY,
Petitioner,
V.
SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,
V.
SECURITIES INDUSTRY ASSOCIATION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA URGING REVERSAL

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Legal Foundation of America respectfully moves for leave to file the attached brief of amicus curiae pursuant to Rule 42 of the Revised Rules of this Court and would show the Court as follows:

1. Identity of Amicus Curiae: The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. It is located on the campus of the South Texas College of Law in Houston and shares certain activities and personnel with the law school. LFA has expertise in matters of economics and public policy. All litigation undertaken by LFA is approved by its Board of Trustees, which consists of attorneys, academics and businesspeople.

2. Interest of Amicus Curiae: Among LFA's principal aims are the improvement of the use of the market system of resource allocation and removal of unreasonable regulation. LFA has participated as amicus curiae in this honorable Supreme Court, in the federal courts of appeals, in federal district courts, and in the courts of the several states, in pursuit of these goals. It has supported reliance on the market or has attempted to enhance the efficiency of regulation in such diverse industries as broadcasting, health care, natural gas production, mining, insurance, and commercial lending.

3. Desirability of an Amicus Curiae Brief: The decision under review affects the potential for procompetitive benefits in one of the most fundamental markets in our economy, the capital market. The legitimacy of that decision depends in turn upon the interpretation of statutes and, hence, the discerning of legislative intent, as well as upon a review of the decision in its economic context. LFA's activities in regulatory cases have frequently required it to consider interpretation of statutes. LFA is in a position to do so from a perspective different from that of the parties, i.e., a perspective of public policy. Furthermore, LFA's expertise in the application of law to economic matters makes it likely that LFA can assist the Court in fully developing the issues in this regard. Although the parties are clearly represented by capable and diligent counsel, their perspectives on the case make it unlikely that all such issues will be developed in the absence of amicus curiae briefing.

4. Issues Briefed: Amicus curiae has briefed only the issue regarding the proper interpretation of the McFadden Act, both from a traditional statutory interpretation standpoint and a public policy focus.

5. Previous Appearance in a Related Case: LFA has previously appeared as amicus curiae in this Court in the case of *Securities Industries Ass'n v. Board of Governors*, 104 S. Ct. 3003 (1984), and in the Second Circuit Court of Appeals in *Independent Bankers Ass'n v. Marine Midland Bank*, 757 F.2d 453 (2d Cir. 1985), cases which presented questions closely related to those in the case at bar.

6 *Requests for Consent of Parties:* Amicus curiae timely requested consent of all parties. The consent of petitioners Robert L. Clarke, Comptroller of the Currency, and Security Pacific National Bank has been received and is included herewith. Consent of respondent Securities Industry Association has been denied.

For the foregoing reasons, this Motion for Leave to File Amicus Curiae Brief should be granted.

Dated _____, 1986.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

Amicus curiae adopts the statements made in paragraphs 1 and 2 of the Motion for Leave preceding this brief, as showing the interest of amicus curiae.

SUMMARY OF ARGUMENT

Discount brokerage services are not included in the definition of branch banking in the McFadden Act. Their inclusion would not serve the purpose of the Act, because they do not involve competition for banking services. The opinions of this

Court hold that the decision of the Comptroller on this matter should be given "the greatest deference."

The ability to operate discount brokerages allows banks the flexibility needed to maintain their viability in a changing financial community. Further, by making such services available at greater convenience and less expense, banks are able to better serve the public.

ARGUMENT

I. THE DECISION OF THE COMPTROLLER IS CONSISTENT WITH BOTH THE PLAIN LANGUAGE AND THE STATUTORY PURPOSE OF THE McFADDEN ACT, AND SHOULD BE GIVEN DEFERENCE BY THE COURTS.

A. The subsidiaries at issue in this case are not branch banks, either by definition or by a purpose interpretation of the McFadden Act.

As defined in the McFadden Act, "branch banks" include bank offices at which "deposits are received, or checks paid, or money lent." 12 U.S.C. sec. 36(f) (1982). The discount brokerages considered herein perform none of these functions. *See Decision of the Comptroller of the Currency, Comptroller's Petition for a Writ of Certiorari,* Appendix D, pp. 39a-41a. Respondents contend that such offices are nonetheless "branch banks" by applying the argument that, since the definition states that a branch "includes" offices at which the above activities are carried on, "it may include more." Brief in Opposition to Petition for Writ of Certiorari at 3, *quoting First National Bank in Plant City v. Dickinson,* 396 U.S. 122, 135 (1969).[1] Amicus

1 The statement by the Court that the definition of branch banking "may include more" than the three enumerated functions was not controlling in *Plant City*, since the activity being considered there, the receipt of money by armored cars and off-premises receptacles, was found to constitute receipt of deposits. *Plant City*, 396 U.S. at 137.

does not dispute that the use of the word "include" in the definition adds flexibility to the interpretation of the statute. However, a recognition that the definition *may* include activities not specifically mentioned in the definition, does not mean that it *must* include any other activity in which the bank could be engaged, or there would be no reason to list the activities in the definition. *See Comptroller's Petition for a Writ of Certiorari* at 17. The securities brokerage activity involved in this case should not be included in the definition of branch banking for the reasons set out herein.

When the application of a statute to a particular situation is unclear, a review of the legislative purpose and an analysis of the "true intent" of the legislature can be helpful interpretative tools. 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION sec. 45.09 at 40, 41. Finding the legislature's "true intent" involves a four-step process of asking "what was the law before the act, what was the mischief or defect to be corrected, what was the remedy designed to cure the defect and what was the true reason of the remedy." J. DAVIES, LEGISLATIVE LAW AND PROCESS IN A NUTSHELL sec. 43-4 (1975). The answers to these questions support the conclusion that the statute does not apply to the case at hand.

The law before the act did not deal specifically with branch banking, and therefore national banks were unable to branch. State banks, on the other hand, were not generally so restricted, and in the early part of this century began to expand geographically along with the expansions that were taking place in society and the economy. *See* E. SYMONS & J. WHITE, BANKING LAW: TEACHING MATERIALS 97 (2d ed. 1984). By the end of 1923, when national banks were allowed *no* branches, state banks had a total of 2,054 branches. *First National Bank v. Walker Bank and Trust,* 385 U.S. 252, 257 (1966).

The obvious defect in this system is the severe competitive disadvantage of the *national* banks. The Comptroller stated in his Annual Report of 1923 that if this situation were allowed to continue, it would "mean the eventual destruction of the national banking system." H.R. Doc. No. 90, 68th Cong., 1st Sess.

6 (1924). The House of Representatives stated that the situation was "intolerable to the national banking system." H.R. Rep. No. 83, 69th Cong., 1st Sess. 7 (1926). *See generally, Walker Bank, supra,* at 256-258.

The remedy in the McFadden Act, designed to prevent the destruction of the national banking system, was to allow national banks to establish branches in those states where branch banking was permitted, to the extent the state banks were allowed to branch.[2] Given the prior history, this remedy was not adopted as a limitation on national banks, but rather as an expansion of their powers, protecting their very existence.

The true reason for the remedy chosen by Congress thus appears clear: "to place national and state banks on a basis of 'competitive equality' *insofar as branch banking was concerned.*" *Walker Bank,* 385 U.S. at 261 (emphasis added). The competitive equality of state and national banks as banks is not disturbed, and the existence of either is not jeopardized,[3] when national banks are allowed to operate subsidiaries for discount brokerage services. The securities brokerage business, while closely related to banking, is a nonbanking activity, *see Securities Industry Ass'n v. Board of Governors,* 104 S. Ct. 3003, 3006, 3007 n. 9 (1984), and there is therefore no competition for basic banking services implicated. There is no reason why a customer could not easily choose to use the discount brokerage services

2 The original version of the McFadden Act allowed national banks to branch "within their home city if state law permitted state banks to do likewise," Comment, *Circumventing the McFadden Act: The Comptroller of the Currency's Efforts to Broaden the Branching Capabilities of National Banks,* 72 KY. L. J. 707, 713 (1983-84), but was amended in 1933 to allow national banks to branch "on the same basis as the state banks." *Id.* at 714.

3 The Glass-Steagall Act protects against the risks which might otherwise be involved by specifically providing that banks may buy and sell securities *only* for the account of bank customers. 12 U.S.C. sec. 24 Seventh (1982). Furthermore, the brokerage activity involved herein actually enhances the financial integrity of banks as is discussed in Part II of this brief.

offered by one bank, and yet choose another bank for his basic banking services, in much the same manner that many customers choose a credit card service of a bank other than the bank they use for basic banking.

B. Deference to the decision of the Comptroller is especially appropriate in this case.

The Comptroller has already pointed out the need for deference in a case such as this where the statute contains a "calculated indefiniteness," Comptroller's Petition for a Writ of Certiorari at 15-16, and where the court's interpretation would "disrupt long-settled practice in the banking industry." Id. at 16. Amicus would like to add that in matters of banking or financial regulation, the courts have not only granted deference to administrative bodies, but have given them "the greatest deference." *Board of Governors v. Investment Co. Inst.,* 450 U.S. 46, 56 (1981). The reasons for deferring to the Board's expertise apply equally to decisions of the Comptroller.

> Not only because Congress has committed the system's operation to their hands, but also because the system itself is a highly specialized and technical one, requiring expert and coordinated management in all its phases, I think their judgment should be conclusive upon any matter which, like this one, is open to reasonable difference of opinion. Their specialized experience gives them an advantage judges cannot possibly have, not only in dealing with the problems raised for their discretion by the system's working, but also in ascertaining the meaning Congress had in mind in prescribing the standards by which they should administer it. Accordingly their judgment in such matters should be overturned only where there is no reasonable basis to sustain it or where they exercise it in a manner which clearly exceeds their statutory authority.

Board of Governors v. Agnew, 329 U.S. 441, 450 (1947).

Further, as this Court has frequently pointed out, an administrative interpretation need not be the one the court would have made if it were confronted with the problem in the first instance, nor need it be the only reasonable interpretation. In a situation such as this, where the administrator is charged with the initial decision making, the interpretation need only be a reasonable interpretation. *Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist.*, 104 S. Ct. 2472, 2480 (1984); *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 103 S. Ct. 1921, 1933 (1983); *Unemployment Compensation Comm'n v. Aragan*, 329 U.S. 143, 153-54 (1946). The Comptroller's interpretation in this case is not only reasonable, but desirable.

II. THE DECISION OF THE COMPTROLLER IN THIS CASE BETTER SERVES THE NEEDS OF THE FINANCIAL COMMUNITY AND THE PUBLIC THAN DOES THE DECISION OF THE COURT OF APPEALS.

In addition to the purpose of promoting competitive equality, another important purpose of the McFadden Act appears in the following quote of Representative McFadden:

> As a result of the passage of this act, the national bank act has been so amended that national banks are able to *meet the needs of modern industry and commerce* and competitive equality has been established among all member banks of the Federal reserve system.

68 Cong. Rec. 5815 (1927) (emphasis added). This purpose of meeting the needs of the modern financial community cannot be ignored if the banking system is to retain its vitality. Indeed, the McFadden Act itself came about as a response to needs created by the effects of social and economic changes on branch banking. *See* SYMONS & WHITE, *supra*, at 97.

The financial community is again undergoing significant changes. As a result, a decision such as the one rendered herein, while having little impact on the competitive equality of national banks and state banks, has significant impact on the competition the banking industry as a whole faces from other types of financial services institutions. This competition is not addressed by the McFadden Act. As has been stated in a recent law review article:

> . . . Commercial banks are increasingly becoming part of a broader financial services industry . . . The thrift industry is now directly competing with banks but is not subject to the constraints of the McFadden Act. . .
>
> Several nondepository institutions have entered the financial service industry. Brokerage firms offer the equivalent of checking accounts but pay market interest rates. Sears, Roebuck & Company is establishing a nationwide network of financial service centers within their department stores. American Express . . . also has an impressive interstate network. Bankers are beginning to view these institutions as direct competitors.

Comment, *Circumventing the McFadden Act: The Comptroller of the Currency's Efforts to Broaden the Branching Capabilities of National Banks*, 72 KY. L. J. 707, 722-723 (1983-84) (footnotes omitted). Banks as institutions must be able to respond to change by developing their services in appropriate areas. Based on this Court's decision in *Securities Industry Ass'n v. Board of Governors*, discount brokerage service appears to be an appropriate area. It would be ironic if the McFadden Act, designed to preserve the financial integrity of national banks and allow them to respond to social and economic change, became in this instance the ultimate obstacle preventing needed changes.

The overly broad interpretation of the McFadden Act in this case also does a disservice to the public. In its *Securities Industry Ass'n* opinion, this Court reiterated the benefits to the

public which would accrue from the acquisition of a discount securities brokerage by a bank holding company. These benefits, identified by the Board of Governors, were "the increased competition and the increased convenience and efficiencies that the acquisition would bring to the retail brokerage business." *Securities Industry Ass'n*, 104 S. Ct. at 3007. There is no reason these benefits should be lost to certain segments of the public because of an unnecessarily broad statutory interpretation.

A recent law review article discussing the situation in Texas provides meaningful insight into the problem. The author points out that discount brokerage services are offered at additional locations in Texas, despite the state's prohibition of branch banking, emphasizing that since "the bank brokerage industry has not been proven to produce any of the ills sought to be avoided by the passage of the Glass-Steagall Act, the enforcers of branch banking laws have not made an asserted effort to pursue the letter of the law in this industry." Osborn, *Discount Brokerage Services, The Glass-Steagall Act, and Branch Banking in Texas*, 16 ST. MARY'S L.J. 185, 209 (1984).[4] The willingness to allow such services in a state which prohibits branching stems not only from the fact that no real detriment is involved, but from the additional fact that offering the services is beneficial to the bank and to the community. He observes that any arguments favoring prohibition "are seemingly outweighed by the arguments of an expanding economy and the desire of the public to have certain services made more convenient and at a lesser cost" at its option. *Id.* at 210. The Second Circuit Court of Appeals has specifically considered consumer demand when, as here, the industry has already become very involved in responding to new developments. As that court said, " . . . if the momentum already developed should be stopped, it should be done by Congress, and not by this court, particularly when the barrier we are asked

4 The author had previously concluded that, although the Texas courts had not addressed the question, the operation of such services is at least a technical contravention of "the letter of the law" in Texas, based in part on the district court's reversal of the Comptroller's decision herein. 16 ST. MARY'S L.J. at 207-209.

to impose would be based upon definitions framed over 50 years ago." *Independent Bankers Ass'n v. Marine Midland Bank*, 757 F.2d 453, 462 (2d Cir. 1985). The same considerations support the Comptroller's interpretation of the statute herein.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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